Ishak bin Haji Shaari v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPLICATION NO M–07–19 OF 2005
GOPAL SRI RAM, AZMEL AND MOHD NOOR JJCA
14 FEBRUARY 2006

Criminal Procedure — Conviction — Application for leave to appeal — Whether questions framed by the applicant were questions of law — Courts of Judicature Act 1964 s 50(2) —

Criminal Procedure — Sentence — Appeal against sentence — Outraging modesty — Whether High Court erred in altering the sentence of imposed by the magistrate — Whether sentence manifestly excessive — Jurisdiction — Rules of the Court of Appeal 1994 r 76

The applicant was convicted by the magistrate's court for having outraged the modesty of a 14 year old schoolgirl contrary to s 354 of the Penal Code. He was sentenced to a term of four years imprisonment and ordered to suffer two strokes of the rotan. The applicant then appealed against his conviction and sentence to the High Court. The main ground of appeal was that the learned magistrate had failed to consider that the version given by the applicant in his evidence was consistent with that given in the cautioned statement that was recorded from him and that both were consistent with his innocence. It was also urged before the High Court that the applicant's conviction should be quashed because the prosecution had failed to challenge the applicant's evidence as to his account of the events. The High Court also rejected that complaint. But it intervened on the issue of sentence. It reduced the term of imprisonment from four to two years and set aside the sentence of whipping. The applicant then moved the Court of Appeal for leave to appeal pursuant to s 50(2) of the Courts of Judicature Act 1964 ('the Act'). Two questions were framed in respect of the two complaints made before the High Court.

Held:

(1) (per **Gopal Sri Ram JCA**) The questions framed by the applicant and said to have arisen out of the judgment of the High Court acting as the court of intermediate appeal were not questions of law. They were merely questions of fact that have to do with the alleged failure on the part of the magistrate's court to undertake a judicial appreciation of the evidence before that court. The issue whether a trial court judicially appreciated the evidence before it is one that relates to a misdirection on the facts and evidence and is therefore not an issue of law. Accordingly, the requirements of s 50(2) of the Act were not satisfied. The application was dismissed (see para 2).

(2) (per **Gopal Sri Ram JCA**) The learned High Court judge erred in altering the sentence imposed by the learned magistrate. The original sentence of four years imprisonment and whipping imposed by the magistrate was not manifestly excessive having regard to the facts of this case. Hence, the learned High Court judge's order altering sentence was flawed because the sentence imposed by the magistrate was not manifestly excessive having regard to the public interest. A manifest injustice had occurred at the intermediate appellate level (see para 3).

(3) (per **Gopal Sri Ram JCA**) Rule 76 of the Rules of the Court of Appeal 1994 ('r 76') empowered the Court of Appeal to intervene and restore the sentence imposed by the magistrate (see para 4). At the time when the Rules of the Supreme Court 1980 were brought into force, there were only two tiers of courts in Malaysia. They were the High Court and the Supreme Court. With the establishment of the Court of Appeal in 1994, the High Court became the intermediate appellate court in respect of matters that originate in the subordinate courts. The right of final appeal in such matters lies to the Court of Appeal whose decision was made final by the Act. If r 76 is read in the way the applicant wants the Court of Appeal to read it, then that would entitle the Court of Appeal to exercise the powers referred to by r 76 only in cases originating in the High Court and coming to the Court of Appeal as the first intermediate filter before finding their way to the Federal Court. Such a restrictive reading of the rule cannot be correct as it ignores the apex function of the Court of Appeal in subordinate court criminal appeals (see para 8).

(4) (per **Gopal Sri Ram JCA**) Rule 76 is a beneficial piece of subsidiary law. It was aimed at doing justice. It is a sweeping provision. The Court of Appeal has the jurisdiction and powers conferred on it by the Federal Constitution and the Act. What r 76 did was to reinforce the Court of Appeal's powers by sweeping into the armoury of powers the Court of Appeal already has, those powers not already mentioned in the Act. As it is a provision whose purpose is the achievement of justice, it must, in accordance with well settled guides to construction be interpreted liberally and not narrowly (see para 9).

(5) (per **Gopal Sri Ram JCA**) When the High Court heard and made its orders on the appeal, it was merely acting in continuation of the trial. Hence, it was clear beyond a peradventure that when an application was made to the Court of Appeal under s 50(2) of the Act, the powers exercisable under r 76 include all those powers exercisable by the High Court by virtue of the Criminal Procedure Code in an appeal or revision brought before that court. Accordingly, if the Court of Appeal when moved for leave to appeal under s 50(2), is satisfied in any given case that the High Court ought not to have disturbed an order made by a sessions judge or magistrate it is perfectly entitled, when refusing leave, to correct the position and to remedy any injustice. Therefore, the Court of Appeal is well empowered to make the orders on the application by the applicant (see para 13).

(6) (per **Mohd Noor JCA**) A muta'a marriage is a marriage contracted between a male Muslim and a female Muslim, a Jew, a Christian or a fire-worshipper, the former declaring to the latter, 'I have united myself to thee' or 'I have married thee' or words to this effect and by fixing the period of cohabitation for a day,

a month, a year or a fixed term of years and by further specifying the amount of dowry (see para 16). In Malaysia, such marriage is prohibited. It is unlawful, invalid and is not recognized (see para 19). In the case, the applicant purported performed a muta'a marriage. It was under these circumstances and the exceptional facts of this case that the Court of Appeal felt compelled to uphold justice and to state that whenever the court is bestowed with the power to do all things necessary to uphold justice, the court must not only say it has such power but must also exercise such power. Hence, by virtue of the powers vested under r 76, the sentence imposed by the magistrate was restored (see para 20).

[Bahasa Malaysia summary

Pemohon telah disabitkan oleh mahkamah majistret kerana telah mencabul kehormatan seorang pelajar sekolah perempuan berumur 14 tahun bertentangan dengan s 354 Kanun Keseksaan. Beliau telah dijatuhkan hukuman empat tahun penjara dan diperintahkan mendapat dua sebatan rotan. Pemohon kemudian telah merayu terhadap sabitan dan hukumannya ke Mahkamah Tinggi. Alasan utama rayuan adalah bahawa majistret yang bijaksana telah gagal untuk mempertimbangkan bahawa versi yang diberikan oleh pemohon dalam keterangan beliau adalah konsisten dengan kenyataan beramaran yang telah direkodkan daripada beliau dan bahawa kedua-duanya adalah konsisten berhubung ketakbersalahannya. Ia juga telah didesak di hadapan Mahkamah Tinggi bahawa sabitan pemohon patut dibatalkan kerana pihak pendakwa telah gagal untuk mencabar keterangan pemohon berkaitan keterangan kejadian tersebut. Mahkamah Tinggi juga menolak aduan tersebut. Namun ia telah campur tangan dalam persoalan tentang hukuman. Ia telah mengurangkan tempoh penjara daripada empat tahun kepada dua tahun dan mengetepikan hukuman sebat. Pemohon kemudian memohon Mahkamah Rayuan kebenaran untuk mengemukakan rayuan menurut s 50(2) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Dua persoalan telah dibentuk berkaitan dua aduan yang dibuat di hadapan Mahkamah Tinggi.

Diputuskan:

(1) (oleh **Gopal Sri Ram HMR**) Persoalan-persoalan yang dibentuk oleh pemohon dan dikatakan telah timbul daripada penghakiman Mahkamah Tinggi yang bertindak sebagai mahkamah rayuan pertengahan bukan persoalan-persoalan undang-undang. Ia hanya persoalan fakta yang berkaitan kegagalan yang dikatakan di pihak mahkamah majistret untuk melaksanakan kesedaran kehakiman tentang keterangan di hadapan mahkamah. Persoalan tentang sama ada mahkamah perbicaraan menyedari dari segi kehakiman keterangan di hadapannya adalah suatu yang berkaitan salah arah fakta-fakta dan keterangan dan oleh itu bukan satu persoalan undang-undang. Sewajarnya, keperluan s 50(2) Akta tidak dipenuhi. Permohonan itu ditolak (lihat perenggan 2).

(2) (oleh **Gopal Sri Ram HMR**) Hakim Mahkamah Tinggi yang bijaksana terkhilaf semasa meminda hukuman yang dikenakan oleh majistret yang bijaksana. Hukuman asal empat tahun penjara dan sebat yang dikenakan oleh

majistret tidaklah melampau berdasarkan fakta-fakta kes ini. Justeru itu, perintah hakim Mahkamah Tinggi yang bijaksana meminda hukuman itu adalah cacat kerana hukuman yang dikenakan oleh majistret tidak melampau kerana ianya mengenai kepentingan awam. Ketidakadilan yang melampau telah berlaku di peringkat rayuan pertengahan (lihat perenggan 3).

(3) (oleh **Gopal Sri Ram HMR**) Kaedah 76 Kaedah-Kaedah Mahkamah Rayuan 1994 ('k 76') memberi kuasa kepada Mahkamah Rayuan untuk campur tangan dan mengembalikan hukuman yang dikenakan oleh majistret (lihat perenggan 4). Pada masa apabila Kaedah-Kaedah Mahkamah Agong 1980 dikuatkuasakan, hanya terdapat dua peringkat mahkamah di Malaysia. Ianya adalah Mahkamah Tinggi dan Mahkamah Agong. Dengan penubuhan Mahkamah Rayuan dalam tahun 1994, Mahkamah Tinggi menjadi mahkamah rayuan pertengahan berkaitan perkara-perkara yang berasal daripada mahkamah bawahan. Hak rayuan terakhir dalam perkara sedemikian terletak pada Mahkamah Rayuan yang mana keputusannya adalah muktamad menurut Akta tersebut. Jika k 76 dibaca dalam cara pemohon ingin Mahkamah Rayuan membacanya, maka ia memberi hak kepada Mahkamah Rayuan untuk menggunakan kuasa yang dirujuk oleh k 76 hanya dalam kes-kes yang berasal dari Mahkamah Tinggi dan ke Mahkamah Rayuan sebagai penapis pertengahan pertama sebelum tiba ke Mahkamah Persekutuan. Pembacaan terbatas sedemikian berhubung kaedah itu tidak betul kerana ia tidak mengendahkan fungsi tertinggi Mahkamah Rayuan dalam rayuan-rayuan mahkamah bawahan (lihat perenggan 8).

(4) (oleh **Gopal Sri Ram HMR**) Kaedah 76 adalah undang-undang subsidiari yang memberi manfaat. Ia bertujuan untuk melaksanakan keadilan. Ia satu peruntukan umum. Mahkamah Rayuan mempunyai bidang kuasa dan kuasa yang diberikan kepadanya oleh Mahkamah Persekutuan dan Akta tersebut. Apa yang k 76 lakukan adalah untuk menguatkuasakan semula kuasa Mahkamah Rayuan dengan memberikan kuasa Mahkamah Rayuan yang telah ada, kuasa yang tidak disebutkan dalam Akta itu. Oleh kerana ia suatu peruntukan yang bertujuan untuk mencapai keadilan, ia hendaklah, menurut panduan yang ditetapkan untuk pembentukan undang-undang ditafsirkan secara luas dan tidak sempit (lihat perenggan 9).

(5) (oleh **Gopal Sri Ram HMR**) Apabila Mahkamah Tinggi mendengar dan membuat perintah-perintah untuk rayuan itu, ia hanya bertindak untuk menyambung perbicaraan. Oleh itu, ia adalah jelas bahawa apabila satu permohonan telah dibuat ke Mahkamah Rayuan di bawah s 50(2) Akta tersebut, kuasa-kuasa yang digunakan di bawah k 76 termasuklah semua kuasa-kuasa yang digunakan oleh Mahkamah Tinggi menurut Kanun Tatacara Jenayah dalam satu rayuan atau penyemakan yang dihadapkan ke mahkamah tersebut. Sewajarnya, jika Mahkamah Rayuan apabila memohon kebenaran untuk merayu di bawah s 50(2), telah dipenuhi dalam apa-apa kes yang diberikan bahawa Mahkamah Tinggi tidak patut mengganggu satu perintah yang dibuat oleh hakim mahkamah sesyen atau majistret ia memang berhak, apabila menolak kebenaran, untuk membetulkan kedudukan dan untuk meremedikan apa-apa ketidakadilan. Oleh itu, Mahkamah Rayuan

mempunyai kuasa untuk membuat perintah-perintah berdasarkan permohonan oleh pemohon itu (lihat perenggan 13).

(6) (oleh **Mohd Noor HMR**) Satu perkahwinan muta'a adalah satu perkahwinan yang dibuat oleh seorang lelaki dan seorang wanita Muslim, seorang yang berbangsa Yahudi, Kristian atau pemuja api, yang man si lelaki mengisytiharkan kepada si wanita, 'I have united myself to thee' or 'I have married thee' atau perkataan-perkataan yang memberi kesan sedemikian dan dengan menetapkan tempoh perbuatan bersekedudukan untuk sehari, sebulan, setahun atau untuk tempoh beberapa tahun yang ditetapkan dan dengan menyatakan jumlah hantaran kahwin (lihat perenggan 16). Di Malaysia, perkahwinan sebegini dilarang. Ia salah di sisi undang-undang, tidak sah dan tidak diiktiraf (lihat perenggan 19). Dalam kes ini, pemohon dikatakan telah melaksanakan perkahwinan muta'a. Ia adalah di bawah keadaan berikut dan fakta-fakta luar biasa kes ini maka Mahkamah Rayuan berasa perlu untuk menegakkan keadilan dan untuk menyatakan bahawa apabila mahkamah diberikan kuasa untuk berbuat semua perkara yang perlu untuk menegakkan keadilan, mahkamah tersebut hendaklah tidak mengatakan ia mempunyai kuasa sedemikian tetapi juga hendaklah menggunakan kuasa tersebut. Justeru itu, menurut kuasa-kuasa yang diberikan di bawah k 76, hukuman yang dikenakan oleh majistret dikembalikan (lihat perenggan 20).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3150–3191.

For cases on conviction generally, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1449–1527.

Cases referred to

Balasingham v Public Prosecutor [1959] MLJ 193
Bali Reddy, Re (1913) ILR 37 Mad 119
Bansi Lal v Emperor (1907) 12 CWN 438
Msimanga Lesaly v Public Prosecutor [2005] 4 MLJ 314
PP v Amir bin Mahmood & Ors [1996] 5 MLJ 159
Queen-Empress v Jabanulla (1896) 23 ILR 23 Cal. 975
Ranjit Singh v State AIR 1952 HP 81,

Legislation referred to

Courts of Judicature Act 1964 s 50(2)
Criminal Procedure Code
Penal Code [India] ss 147, 304
Rules of the Court of Appeal 1994 r 76
Rules of the Supreme Court 1980 r 120

Dato' Muhammad Shafee Abdullah (Badrul Munir Bukhari with him) (Karpal Singh & Co) for the appellant.
Meor Hashimi bin Abdul Hamid (Attoney General's Chambers) for the respondent.

Gopal Sri Ram JCA:

[1] The applicant was convicted by the Magistrate's Court in Melaka for having outraged the modesty of a 14 year old schoolgirl contrary to s 354 of the Penal Code. He was sentenced to a term of four years imprisonment and ordered to suffer two strokes of the rottan. The applicant then appealed against his conviction and sentence to the High Court. The main ground of appeal was that the learned magistrate had failed to consider that the version given by the applicant in his evidence was consistent with that given in the cautioned statement that was recorded from him and that both were consistent with his innocence. The High Court rejected that argument. It applied the judgment of this court in *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 where the trial judge had excluded the exculpatory cautioned statement of the accused and refused to consider it altogether on the ground that it was prejudicial to her co-accused. We held that this omission by the judge was not fatal. And we said this (at p 324):

> The degree of credence that a court is reasonably expected to assign to a particular version of events depends on the facts and circumstances of each case. And, the mere fact that an accused's evidence is consistent with his or earlier out of court statements does not require a court in every case to hold that he or she is a witness of truth. Were it otherwise, the assessment of oral testimony would become a robotic function. But the judicial appreciation of evidence is a human and not a robotic function. There are no fixed rules about it: only general guidelines. That much is made clear by numerous judgments of our courts.

[2] It was also urged before the High Court that the applicant's conviction should be quashed because the prosecution had failed to challenge the applicant's evidence as to his account of the events. The High Court also rejected that complaint. But it intervened on the issue of sentence. It reduced the term of imprisonment from four to two years and set aside the sentence of whipping. The applicant then moved this court for leave to appeal pursuant to s 50(2) of the Courts of Judicature Act 1964 ('the Act'). Two questions were framed in respect of the two complaints made before the High Court. Having very carefully examined the motion and the affidavits filed in support, we were satisfied that the questions framed by the applicant and said to have arisen out of the judgment of the High Court acting as the court of intermediate appeal are not questions of law at all. They are merely questions of fact that have to do with the alleged failure on the part of the magistrate's court to undertake a judicial appreciation of the evidence before that court. The issue whether a trial court judicially appreciated the evidence before it is one that relates to a misdirection on the facts and evidence and is therefore not an issue of law. Accordingly, the requirements of s 50(2) of the Act were not satisfied. We were unanimous in deciding to dismiss the application.

[3] However, having read and re-read the motion paper provided to us, we were satisfied that the learned judge erred in altering the sentence imposed by the learned magistrate. We formed the view that the original sentence of four years imprisonment and whipping imposed by the magistrate was not manifestly excessive having regard to the facts of this case. Here you have an accused who is an Ustaz or religious teacher

to whom the victim's parents had entrusted their 14 year old child — their daughter. Based on the concurrent findings made by the courts below, the accused took the victim to his home where, after inviting her to join him in prayer, he purported to undergo a summary marriage ceremony with her. Thereafter, the applicant took the preparatory steps to having sexual intercourse with the child. He fondled her. When she refused to have intercourse, he placed a copy of the Koran on the victim's head and made her swear on the Holy Book that she would not reveal to anyone the events that had happened in his home. This is therefore glaringly a case where the accused had used his position as a religious teacher to attempt to satisfy his carnal desires. This is accordingly a very serious offence by its very nature aggravated by the circumstances in which it was committed. Hence, the learned judge's order altering sentence was, with respect, flawed because the sentence imposed by the magistrate was not manifestly excessive having regard to the public interest. In our view, a manifest injustice had occurred at the intermediate appellate level. The case cried out for justice.

[4] We therefore drew the attention of counsel for the accused to r 76 of the Rules of the Court of Appeal 1994 and inquired whether that rule on its proper construction empowered us to intervene and restore the sentence imposed by the magistrate. He submitted that the rule did not empower us to do so and that if we acted under that rule, we would be embarking on an illegal procedure. Both he and his client would not participate in such an illegal proceeding. In the light of the stand counsel took, this court through our learned brother Mohamed Noor JCA, explained to the applicant that we proposed to restore the sentence imposed by the magistrate and allowed him an opportunity to be heard. He too, on the advice of counsel, elected not to say anything to dissuade us. After careful consideration, we set aside the order of the High Court as to sentence and restored the original sentence imposed on the applicant.

[5] Before we deal with whether counsel is correct in his argument, it is necessary to see what r 76 (the marginal note to which reads 'Ancillary powers of the court') says. It says this:

> The court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the court.

[6] There are four things we would note about the rule. First, historically speaking, it is a reproduction of r 120 of the Rules of the Supreme Court 1980 which were formerly known as the Rules of the Federal Court 1980. In 1994, when this Court was established, the Rules of the Court of Appeal were passed incorporating *verbatim* almost all the rules in the Rules of the Supreme Court 1980 with some re-numbering. Second, it applies to both appeals and applications. Third, that it is an empowering provision. Fourth, that the powers it may exercise are those vested in the trial judge at any stage, even after the trial.

[7] Counsel argues that the rule does not apply to this case because it employs the phrases 'trial' at first instance and 'trial judge' and 'before, during or after the trial'. It does not refer to the powers of the High Court when exercising its appellate function. With respect we do not agree with this submission. Our reasons are as follows.

[8] In the first place, regard must be had to the history of the rule. Some of that history was referred to a moment ago. What needs to be added is this. At the time when the Rules of the Supreme Court 1980 were brought into force, there were only two tiers of courts in Malaysia. They were the High Court and the Supreme Court. With the establishment of this court in 1994, the High Court became the intermediate appellate court in respect of matters that originate in the Subordinate Courts. The right of final appeal in such matters lies to this court whose decision is made final by the Act. If r 76 is read in the way counsel wants us to read it, then that would entitle us to exercise the powers referred to by that rule only in cases originating in the High Court and coming to us as the first intermediate filter before finding their way to the Federal Court. Such a restrictive reading of the rule cannot be correct as it ignores the apex function of this court in subordinate court criminal appeals. It is also unrealistic as it ignores the historical background to the rule.

[9] In the second place, counsel's suggestion is really an invitation to us to interpret the rule literally. That is an erroneous approach. The correct approach is the purposive one. The rule is a beneficial piece of subsidiary law. It is aimed at doing justice, which is the primary duty of this — and indeed any other — court. It is a sweeping provision. This court has the jurisdiction and powers conferred on it by the Constitution and the Act. What r 76 does is to reinforce this court's powers by sweeping into the armoury of powers this court already has, those powers not already mentioned in the Act. As it is a provision whose purpose is the achievement of justice, it must, in accordance with well settled guides to construction be interpreted liberally and not narrowly. Counsel's response to this is that his client will not receive justice if the rule is read so as to empower us to restore the magistrate's orders of punishment. The short answer to this is that justice is not only to the accused but also to the State and to the victim of the crime.

[10] In the third place, counsel's argument overlooks that in the word 'trial' in the context of r 76, having regard to its purpose includes an appeal. As a matter of pure principle, it has been held in a number of decisions concerning criminal cases that an appeal is part of the trial of an offence or a mere continuation of it. In *Queen-Empress v Jabanulla* (1896) 23 ILR 23 Cal. 975 at p 977, O'Kinealy J said that an appeal 'is not a second trial, but only a continuation of the first trial.' This view was followed in the case of *Re Bali Reddy* (1913) ILR 37 Mad 119 where the accused had been charged for murder and rioting but had been convicted by the sessions court for offences under ss 304 and 147 of the Indian Penal Code. In dealing with the contention that the appeal was a fresh proceeding, the court comprising of Benson and Sundara Ayyar JJ said, 'the present appeal is not a second trial but a continuation of the trial in the sessions court.' Lastly in *Bansi Lal v Emperor* (1907) 12 CWN 438, the court held that 'an appeal is part of the trial of an offence.'

[11] There is one further case of interest that supports the point we make. In *Ranjit Singh v State* AIR 1952 HP 81, it was argued that those provisions in the Criminal Procedure Code which empower the High Court to reverse an acquittal or act in revision to the prejudice of an accused offended the *autrefrois acquit* and *autrefois convict* principle embodied in the Indian Constitution. The court in rejecting this contention said that:

> an accused cannot be said to have been convicted or acquitted as a result of a judgment passed in the course of 'prosecution and punishment' if that judgment is still open to appeal to a court of higher jurisdiction. It has therefore been held under the corresponding provisions of s 403 of the Code that an appeal is not a second trial but only a continuation of the trial in the sessions court.

[12] Closer to home, Ismail Khan J (as he then was) in the case of *Balasingham v Public Prosecutor* [1959] MLJ 193 observed as given (at p 194):

> An appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate court are entitled to know the reasons for the finding.

[13] So, in the instant case, when the High Court heard and made its orders on the appeal to which we have already referred, it was merely acting in continuation of the trial. Hence, it is clear beyond a peradventure that when an application is made to this court under s 50(2) of the Act, the powers exercisable by us under r 76 include all those powers exercisable by the High Court by virtue of the Criminal Procedure Code in an appeal or revision brought before that court. Accordingly, if this court when moved for leave to appeal under s 50(2), is satisfied in any given case that the High Court ought not to have disturbed an order made by a sessions judge or magistrate it is perfectly entitled, when refusing leave, to correct the position and to remedy any injustice. We are therefore satisfied that we were well empowered to make the orders we did on the application by the applicant. But we would add that the time is perhaps ripe for the Rules Committee to amend r 76 to reflect our function as a court of second and final appeal in those matters originating before the subordinate courts.

[14] There is an alternative ground on which our order may be sustained. This court as a superior court of record has an inherent jurisdiction to make such orders as are in the interests of justice without regard to technicalities. There are however limitations to the use by any court of record of its inherent jurisdiction. It cannot be used when there is an express statutory provision covering the precise subject matter. It must be exercised, to borrow the words of Abdul Malik Ishak J in *Public Prosecutor v Amir bin Mahmood & Ors* [1996] 5 MLJ 159, 'fairly, cautiously and rarely and only when the court considers that the ends of justice require it.' We have already set out our reasons earlier in this judgment as to why this case cries out for justice. So, even if we are wrong in our interpretation of r 76, we are of the opinion that we may safely rely on this court's inherent jurisdiction to sustain our order restoring the sentence passed by the magistrate's court.

[15] We add by way of postscript that upon application of counsel we directed a stay of the sentence of whipping pending the applicant's attempt to move the Federal

Court in this matter under what counsel said was the inherent jurisdiction of that court. A careful perusal of the Act makes it amply clear that the Federal Court's jurisdiction does not extend to hearing appeals from decisions of this court in criminal or civil matters that originate in a subordinate court. Nevertheless, in the interests of justice, we considered it appropriate to stay the corporal punishment to enable the applicant to pursue the inherent jurisdiction argument before the Federal Court.

Mohd Noor JCA:

[16] I concur fully with the judgment of my learned brother Gopal Sri Ram JCA. However, the applicant, being an Ustaz, a Muslim scholar and teacher, we feel obliged to correct a misconception that a Muslim in our country can perform a muta'a marriage abroad and that such marriage is valid and recognised according to Muslim Law. A muta'a marriage is a marriage contracted between a male Muslim and a female Muslim, a Jew, a Christian or a fire-worshipper, the former declaring to the latter, 'I have united myself to thee' or 'I have married thee' or words to this effect and by fixing the period of cohabitation for a day, a month, a year or a fixed term of years and by further specifying the amount of dowry.

[17] In this case, the applicant, in a room at his house, no one else being present except the girl, clasped her hand and declared to her:

> Sahaja aku nikahkan diriku dengan Ramlah bte Mahden dengan mas kahwin RM40 hutang (Verily I wed myself to Ramlah bte Mahden with a dowry of RM40).

after which he told the girl to dress up scantily in order for him to consummate the marriage. The girl refused. He coaxed her. She steadfastly refused.

[18] It is observed that by the above declaration, the applicant had purportedly married the girl and thus circumvented the statutory injunction against zina/sexual offences and its punishment in this world and the wrath of God in the hereafter. In so doing, the applicant had imitated a marriage which flourished among the Sabeans and Zoroastrians from earlier times which seem to have continued after their conversion to Islam. Today, only the Isna-Ashari Shia, one of the schools of Shia Law, regard muta'a as a valid marriage. Other schools of Shia Law including the Ismaili Shias do not recognize such marriage. Whereas according to Sunni Law which is practiced in our country, muta'a marriage is prohibited by the Prophet Muhammad, peace be upon him. The Sunnis rely on a Tradition reported by Saidina Ali himself 'Verily the Prophet prohibited, on the day of the battle of Khaiber, a muta'a marriage which is for a fixed time.' There is another tradition according to which a muta'a marriage was once permitted for three days after which it was forbidden by the Prophet.

[19] It was widely reported a few years ago that our students in Iran and in the Middle East contracted a temporary contract of marriage, a pseudo-name for muta'a marriage. Let it be known that in our country, such marriage is prohibited. It is unlawful, invalid and is not recognized.

[20] It is under these circumstances and the exceptional facts of this case that we feel compelled to uphold justice and to state that whenever we are bestowed with the power to do all things necessary to uphold justice, we must not only say we have such power but we must also exercise such power. Hence, by virtue of the powers vested on us under r 76 of the Rules of the Court of Appeal 1994, we restored the sentence imposed by the learned magistrate.

Order accordingly.

Reported by Peter Ling